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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Solomon Matthew Madrid,) No. CV 11-0144-PHX-FJM (ECV)
10 Petitioner,)
11 vs.) **REPORT AND RECOMMENDATION**
12 Charles L. Ryan, et al.,)
13 Respondents.)
14)
15)
16 TO THE HONORABLE FREDERICK J. MARTONE, UNITED STATES DISTRICT
17 JUDGE:

18 **BACKGROUND**

19 Pending before the court is a *pro se* Amended Petition for Writ of Habeas Corpus by
20 a Person in State Custody pursuant to 28 U.S.C. § 2254 filed by Petitioner Solomon Matthew
21 Madrid. Doc. 6. Following a jury trial in 1994 in Maricopa County Superior Court,
22 Petitioner was convicted of three counts of aggravated assault and one count of threatening
23 and intimidating. Doc. 13, Exh. A at 1-2; Doc. 6 at 1-2. The jury found the offenses to be
24 “dangerous” under Arizona law, and Petitioner committed the offenses while on probation
25 for a prior felony conviction. Doc. 13, Exh. A at 4. On March 1, 1994, Petitioner was
26 sentenced to four concurrent terms of life imprisonment without the possibility of parole for
27 25 years. Id.

1 Petitioner subsequently filed a direct appeal in the Arizona Court of Appeals. Doc.
2 6 at 2; Doc.13, Exh. A. In a Memorandum Decision filed on February 8, 1996, the Court of
3 Appeals affirmed Petitioner's convictions and sentences. Doc. 13, Exh. A. Petitioner did
4 not appeal to the Arizona Supreme Court. Doc. 6 at 3.

5 On November 13, 2001, Petitioner filed a *pro se* Notice of Post-Conviction Relief
6 under Rule 32 of the Arizona Rules of Criminal Procedure. Doc. 13, Exh. B. On December
7 4, 2001, the trial court found the notice to be untimely and dismissed it. Doc. 13, Exh. C.
8 There is nothing to indicate Petitioner sought review of the dismissal in a higher court.

9 On September 13, 2002, Petitioner filed a *pro se* Rule 32 Petition for Post-Conviction
10 Relief. Doc. 13, Exh. D. He alleged that a significant change in the law excused his
11 untimely petition. *Id.* He further alleged that he was entitled to relief under Apprendi v.
12 New Jersey, 530 U.S. 466 (2000), because the trial court imposed a sentence beyond the
13 statutory maximum based on a fact (his probation status) not found by the jury. *Id.* In a
14 Minute Entry on October 8, 2002, the trial court dismissed the petition because the Arizona
15 Court of Appeals had already declared that Apprendi did not apply retroactively to cases that
16 had been finally adjudicated. Doc. 13, Exh. E. Petitioner did not seek review in the Arizona
17 Court of Appeals or the Arizona Supreme Court. Doc. 6 at 5.

18 Petitioner filed another *pro se* Petition for Post-Conviction Relief on June 1, 2005.
19 Doc. 13, Exh. F. He alleged a significant change in the law based on the Supreme Court
20 decision in Blakely v. Washington, 542 U.S. 296 (2004), and again argued his sentence was
21 unlawfully enhanced based on a factor determined by the judge and not the jury. *Id.* On
22 October 5, 2005, the trial court again dismissed his petition after determining that Blakely
23 did not apply to convictions that were already final, as Petitioner's was. Doc. 13, Exh. G.
24 A subsequent petition for review was denied by the Arizona Court of Appeals on September
25 13, 2006. Doc. 13, Exh. I. Although Petitioner claims he sought further review in the
26 Arizona Supreme Court, no evidence of that in the record has been shown.

27 Additionally, another Notice of Post-Conviction Relief was filed in the trial court on
28 December 13, 2005, that contains the same claim raised in the prior petitions. Doc. 13, Exh.

1 H. The notice was signed by Petitioner three months earlier in September 2005. *Id.* It is not
2 clear from the information provided if the notice was ever separately addressed by the trial
3 court.

4 On April 14, 2009, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus in the
5 state court. Doc. 13, Exh. J. The trial court denied the petition on September 20, 2009, after
6 determining that the petition raised the same arguments that were considered and rejected in
7 previous Rule 32 petitions. Doc. 13, Exh. K. A notice of appeal of the trial court's order was
8 subsequently denied as untimely by the Arizona Court of Appeals. Doc. 13, Exh. L, M.

9 On January 21, 2011, Petitioner filed his habeas petition in this court. Doc. 1. After
10 the District Court Judge dismissed the petition with leave to amend, Petitioner filed his
11 amended petition on February 24, 2011. Doc. 5, 6. Petitioner raises one ground for relief
12 in the amended petition. He alleges that his rights under the Fifth, Sixth and Fourteenth
13 Amendments were violated when his sentence was increased beyond the statutory maximum
14 based on a factual determination by the trial judge rather than the jury. On May 10, 2011,
15 Respondents filed a Limited Answer to Petition for Writ of Habeas Corpus. Doc. 13.
16 Petitioner then filed a Reply and a Declaration in Support on June 3, 2011. Doc. 14, 15. On
17 August 19, 2011, Petitioner filed a Motion to Compel in which he seeks appointment of
18 counsel and a conditional writ of habeas corpus to return to the state court. Doc. 17. No
19 response to the motion to compel has been filed.

20 **DISCUSSION**

21 Respondents contend that the petition should be dismissed because it was not filed
22 within the statute of limitations period. They further contend that the claim is procedurally
23 defaulted and not cognizable on habeas review. Based on the discussion below, the court
24 finds that the habeas petition is barred by the statute of limitations and recommends that it
25 be denied on that basis.

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1 **A. Legal Standards**

2 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a
3 statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners.
4 28 U.S.C. § 2244(d)(1).¹ The statute provides:

5 A 1-year period of limitation shall apply to an application for a writ of habeas
6 corpus by a person in custody pursuant to the judgment of a State court. The
7 limitation period shall run from the latest of—

8 (A) the date on which the judgment became final by the
9 conclusion of direct review or the expiration of the time for
10 seeking such review;

11 (B) the date on which the impediment to filing an application
12 created by State action in violation of the Constitution or laws
13 of the United States is removed, if the applicant was prevented
14 from filing by such State action;

15 (C) the date on which the constitutional right asserted was
16 initially recognized by the Supreme Court, if the right has been
17 newly recognized by the Supreme Court and made retroactively
18 applicable to cases on collateral review; or

19 (D) the date on which the factual predicate of the claim or
20 claims presented could have been discovered through the
21 exercise of due diligence.

22 State prisoners whose convictions became final before the AEDPA effective date of
23 April 24, 1996, had a one-year grace period in which to file their petitions. Patterson v.
24 Stewart, 251 F.3d 1243, 1245 (9th Cir. 2001). Thus, any such petitions had to be filed by
25 April 24, 1997. Id.

26 Additionally, "[t]he time during which a properly filed application for State post-
27 conviction or other collateral review with respect to the pertinent judgment or claim is
28 pending shall not be counted toward" the limitations period. 28 U.S.C. § 2244(d)(2); see also
29 Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002). A post-conviction petition is "clearly
30 pending after it is filed with a state court, but before that court grants or denies the petition."

31 ¹ Because Petitioner's habeas petition was filed after the AEDPA effective date of
32 April 24, 1996, the Act's provisions apply to this case. Patterson v. Stewart, 251 F.3d 1243,
33 1245 (9th Cir. 2001).

1 Chavis v. Lemarque, 382 F.3d 921, 925 (9th Cir. 2004). In Arizona, post-conviction review
2 is pending once a *notice* of post-conviction relief is filed even though the petition is not filed
3 until later. Isley v. Arizona Department of Corrections, 383 F.3d 1054, 1056 (9th Cir. 2004).
4 An application for post-conviction relief is also pending during the intervals between a lower
5 court decision and a review by a higher court. See Biggs v. Duncan, 339 F.3d 1045, 1048
6 (9th Cir. 2003) (citing Carey v. Saffold, 536 U.S. 214, 223 (2002)). However, the time
7 between a first and second application for post-conviction relief is not tolled because no
8 application is "pending" during that period. Biggs, 339 F.3d at 1048; see also King v. Roe,
9 340 F.3d 821 (9th Cir. 2003) (The petitioner was "not entitled to tolling during the interval
10 between the completion of one round of state collateral review and the commencement of a
11 second round of review."). Moreover, filing a new petition for post-conviction relief does
12 not reinitiate a limitations period that ended before the new petition was filed. See Ferguson
13 v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003).

14 The statute of limitations under AEDPA is subject to equitable tolling in appropriate
15 cases. Holland v. Florida, 130 S.Ct. 2549, 2560 (2010). However, for equitable tolling to
16 apply, a petitioner must show ““(1) that he has been pursuing his rights diligently and (2) that
17 some extraordinary circumstances stood in his way”” and prevented him from filing a timely
18 petition. Id. at 2562 (quoting Pace, 544 U.S. at 418).

19 **B. Application**

20 Here, the Arizona Court of Appeals issued its decision denying Petitioner’s direct
21 appeal on February 8, 1996. Petitioner then had 30 days to file a petition for review in the
22 Arizona Supreme Court, which he did not do. See Ariz. R. Crim. P. 31.19(a). Thus, under
23 28 U.S.C. § 2244(d)(1)(A), Petitioner’s judgment of conviction became final upon the
24 expiration of the 30-day period for seeking review in the Arizona Supreme Court, which was
25 March 10, 1996. See Hemmerle v. Schriro, 495 F.3d 1069, 1073-74 (9th Cir. 2007)
26 (“Hemmerle’s direct appeal was final upon the expiration of the time for seeking review of
27 the Court of Appeals decision in the Arizona Supreme Court.”). Because the judgment of
28 conviction became final before the effective date of the AEDPA, Petitioner’s federal habeas

1 petition was due on or before April 24, 1997, the end of the one-year grace period. Petitioner
2 filed his federal habeas petition on January 21, 2011, more than 13 years after the deadline.
3 Petitioner's first filing after the conclusion of direct review was the notice of post-conviction
4 relief filed on November 13, 2001. Because the limitations period had already expired years
5 before, however, the petition did not toll or otherwise have any impact on the limitations
6 period. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003). His petition is
7 therefore untimely..

8 Petitioner addresses the timeliness issue in his amended petition. Doc. 6 at 11. First,
9 he claims that the statute of limitations in the AEDPA should not apply because he was
10 sentenced before its effective date. As noted above, however, because his habeas petition
11 was filed after the effective date, the AEDPA's provisions apply.

12 Additionally, he states that he raised this issue only after the United States Supreme
13 Court ruled that sentencing factors that increase a sentence beyond the statutory maximum
14 must be decided by a jury. Doc. 6 at 11. Thus, he appears to argue that the limitation began
15 to run from a later date, the date on which the constitutional right asserted was first
16 recognized by the Supreme Court. See 28 U.S.C. § 2241(d)(1)(C). Because the Apprendi
17 line of cases has not been made retroactively applicable to cases on collateral review,
18 however, such an argument is without merit. See id.

19 In his reply, Petitioner does not refute Respondents' statute of limitations defense, nor
20 does he assert any basis to apply equitable tolling. Rather, he changes course and argues that
21 he is entitled to relief under a state sentencing law, A.R.S. § 13-604.02, which was amended
22 after his offenses occurred but before he was sentenced. Doc. 14. He claims that he was
23 sentenced under the old law but should receive the benefit of the amended law. Because this
24 argument has no bearing on the timeliness of his petition, it does not overcome the statute of
25 limitations defense. Moreover, federal habeas corpus relief is not available for errors of state
26 law. Lewis v. Jeffers, 497 U.S. 764, 780 (1990). Thus, even if the petition was timely, this
27 court could not decide whether the state court properly applied a state sentencing statute.
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1 **C. Motion to Compel**

2 Finally, in his motion to compel, Petitioner argues that he should be able to go back
3 to the state court and appeal the sentencing court's application of the old version of A.R.S.
4 § 13-604.02. He asks the court to appoint counsel and grant a "conditional writ of habeas
5 corpus directing" the state appellate court to hear his appeal. Because the court has found
6 his federal habeas petition to be untimely, it will recommend that the motion to compel be
7 denied as moot.

8 **D. Conclusion**

9 The judgment of conviction in this case became final before the AEDPA was enacted,
10 thus requiring Petitioner to file his federal habeas petition before the one-year grace period
11 expired. Because Petitioner failed to do so, his petition is barred by the statute of limitations.
12 As a result, the court will recommend that the petition be denied and dismissed.

13 **IT IS THEREFORE RECOMMENDED:**

14 That the Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254
15 (Doc. 6) be **DENIED** and **DISMISSED WITH PREJUDICE**; and

16 That the Motion to Compel (Doc. 17) be **DENIED AS MOOT**.

17 **IT IS FURTHER RECOMMENDED:**

18 That a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal
19 be **DENIED** because the dismissal of the Petition is justified by a plain procedural bar and
20 jurists of reason would not find the procedural ruling debatable.

21 This recommendation is not an order that is immediately appealable to the Ninth
22 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
23 Appellate Procedure, should not be filed until entry of the district court's judgment. The
24 parties shall have 14 days from the date of service of a copy of this recommendation within
25 which to file specific written objections with the Court. See, 28 U.S.C. § 636(b)(1); Fed. R.
26 Civ. P. 6(a), 6(b) and 72. Thereafter, the parties shall have 14 days within which to file a
27 response to the objections. Failure to timely file objections to the Magistrate Judge's Report
28 and Recommendation may result in the acceptance of the Report and Recommendation by

1 the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114,
2 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the
3 Magistrate Judge will be considered a waiver of a party's right to appellate review of the
4 findings of fact in an order of judgement entered pursuant to the Magistrate Judge's
5 recommendation. See Fed. R. Civ. P. 72.

6 DATED this 23rd day of September, 2011.

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12 Edward C. Voss
13 United States Magistrate Judge
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